WEST VIRGINIA PUBLIC EMPLOYEES
GRIEVANCE BOARD

SYNOPSIS REPORT

Decisions Issued in January 2009

The Board's monthly reports are intended to assist public employers covered by a grievance procedure to monitor significant personnel-related matters which came before the Grievance Board, and to ascertain whether any personnel policies need to be reviewed, revised or enforced. W. Va. Code §18-29-11(1992). Each report contains summaries of all decisions issued during the immediately preceding month.

If you have any comments or suggestions about the monthly report, please send an e-mail to wvgb@wv.gov.

NOTICE: These synopses in no way constitute an official opinion or comment by the Grievance Board or its administrative law judges on the holdings in the cases. They are intended to serve as an information and research tool only.

TOPICAL INDEX

HIGHER EDUCATION EMPLOYEES

KEYWORDS: BACK PAY; ULTRA VIRES; PAY GRADE

CASE STYLE: JOHNSON v. WEST VIRGINIA UNIVERSITY

DOCKET NO. 2008-0331-WVU (1/27/2009)

PRIMARY ISSUES: Whether an employer is bound by the promise of an agent who does not have the authority to make the promise.

SUMMARY: Grievant asserts he is entitled to back pay as the result of a change in pay grade for the job classification of Systems Operator. Grievant argues that he is entitled to back pay for sixteen months he served in the position prior to the time it was upgraded to pay grade 13. Grievant makes this assertion based upon the representations of an employee of the Human Resources Department. WVU counters that Grievant did not grieve his classification or compensation after transferring into the position of Systems Operator; therefore, he is not entitled to back pay. The person who made the promise to Grievant was not authorized to do so and WVU is not bound by it. In addition, Grievant failed to prove that he is entitled to back pay for the period beginning September 1999 through December 2000. This grievance is denied.

KEYWORDS: EVALUATION, RETALIATION, DISCRIMINATION

CASE STYLE: SHAH v. WEST VIRGINIA UNIVERSITY AT PARKERSBURG

DOCKET NO. 2008-1211-WVUP (1/6/2009)

PRIMARY ISSUES: Whether Respondent acted in a arbitrary and capricious manner when it evaluation the Grievant as "good" instead of "excellent" in the area of "teaching and service to students"?

SUMMARY: Grievant, a professor, maintains Respondent acted in an arbitrary and capricious manner when it evaluated Grievant as "good" instead of "excellent" in the area of "teaching and service to students" on the Grievant's 2007 annual evaluation. Additionally, Grievant asserts that the Respondent acted in a discriminatory and retaliatory manner.

Respondent argues that its evaluation was reasonable and based upon the information presented by the Grievant.

The arbitrary and capricious standard is deferential in nature. The Grievant submitted very few student evaluations and the evaluations he chose to submit contained negative comments. There is no indication that the Respondent's evaluation was unreasonable. Nor is there indication that the Respondent acted in a discriminatory or retaliatory manner. This grievance is DENIED.

KEYWORDS: TIMELY FILING; PROMOTION AND TENURE; EXCUSE; NOTICE; ACQUIESCE TO ERROR

CASE STYLE: MILLER v. FAIRMONT STATE UNIVERSITY

DOCKET NO. 08-HE-005 (1/8/2009)

PRIMARY ISSUES: Whether this grievance was timely filed.

SUMMARY: Grievant was given verbal and written notice that he would not receive promotion and tenure, and he was given a terminal contract. He did not timely file his Level I grievance. Grievance DISMISSED.

TOPICAL INDEX

COUNTY BOARDS OF EDUCATION

PROFESSIONAL PERSONNEL

KEYWORDS: ASSIGNMENT; ITINERANT; POSTING; ARBITRARY AND CAPRICIOUS; DISCRETION; AGREEMENT

CASE STYLE: SISLER v. POCAHONTAS COUNTY BOARD OF EDUCATION

DOCKET NO. 2008-1284-PocED (1/16/2009)

PRIMARY ISSUES: Whether Grievant was properly placed in a different itinerant autism teacher assignment for the upcoming school year.

SUMMARY: Grievant is employed by Respondent as an itinerant special education and autism teacher. In early 2008, due to anticipated needs for special education students and a plan to cluster elementary autism services at Marlinton Elementary, Grievant was asked to sign an agreement to be assigned as itinerant autism teacher at Marlinton for the 2008-2009 school year. Grievant had been assigned to an autistic student and worked in a half-time position as itinerant autism teacher at PCHS in 2007-2008, but there was to be no need for autistic services at PCHS for 2008-2009.

Because of Respondent's ample discretion in personnel matters, Grievant's status as an itinerant employee, and her voluntary agreement to the Marlinton assignment for the 2008-2009 school year, this grievance is DENIED.

KEYWORDS: DEFAULT; REMEDY

CASE STYLE: BROWNING v. LOGAN COUNTY BOARD OF EDUCATION

DOCKET NO. 2008-0567-LOGED (1/27/2009)

PRIMARY ISSUES: Whether the remedy Grievant requested is proper, available or contrary to law, in light of Grievant prevailing on the merits of her grievance, as a result of default.

SUMMARY: Grievant bid on a Licensed Practical Nurse Instructor's position at the Ralph R. Willis Career-Technical Center and was not the successful applicant. Grievant filed a grievance. Subsequently, default was found in this grievance, in that a level one decision was not rendered within fifteen days after the level one hearing. As a result of default, Grievant prevailed on the merits, establishing that she should have been placed in a LPN Instructor's position. Respondent did not pursue a contrary to law action in this matter. The remedy requested by Grievant was found to be proper, available or not contrary to law. Accordingly, the relief requested by Grievant was granted.

KEYWORDS: REPRISAL; ARBITRARY AND CAPRICIOUS; PLANNING PERIOD

CASE STYLE: HUDOK v. RANDOLPH COUNTY BOARD OF EDUCATION

DOCKET NO. 2008-0790-RANED (1/13/2009)

PRIMARY ISSUES: Whether Respondent acted in an arbitrary and capricious manner when changing the Grievant's school schedule to allow for a full-time teacher to have a planning period.

SUMMARY: Grievant is employed by the Randolph County Board of Education ("BOE") as a half-time science teacher at Pickens High School. At the beginning of the 2007-2008 school year, Pickens High School operated on a seven period daily schedule. On October 10, 2007, Superintendent Sue Hinzman received a letter from a Pickens High School teacher that she was not receiving her planning period as required. Consequently, the BOE informed the Pickens High School faculty that effective November 2, 2007, with the start of the new grading period, the school would commence with an eight period day. This scheduling change allowed for all full-time teachers to receive a planning period. Grievant alleges that this scheduling change was the result of reprisal following a request by the faculty for a full-time music teacher. In addition, Grievant argues that the actions of Superintendent Hinzman were arbitrary and capricious. Grievant has failed to prove that the BOE engaged in reprisal, or that the change in the schedule was arbitrary or capricious or otherwise illegal. The grievance is DENIED.

KEYWORDS: SUSPENSION; INSUBORDINATION

CASE STYLE: FARMER v. LOGAN COUNTY BOARD OF EDUCATION

DOCKET NO. 2008-0404-LOGED (1/12/2009)

PRIMARY ISSUES: Whether Grievant was properly suspended for 10 days for insubordination for refusing to implement an individualized plan created for a student with a disability despite repeatedly being instructed to implement the plan.

SUMMARY: Respondent asserts Grievant was insubordinate when he failed to implement a 504 Plan designed to assist a student with a disability. Grievant argues he comported with the Plan. Grievance denied.

TOPICAL INDEX

COUNTY BOARDS OF EDUCATION

SERVICE PERSONNEL

KEYWORDS: POSTING; CLASSIFICATION; JOB TITLE; NON SELECTION

CASE STYLE: MORRIS v. RALEIGH COUNTY BOARD OF EDUCATION

DOCKET NO. 2008-1011-RALED (1/13/2009)

PRIMARY ISSUES: Whether Respondent violated West Virginia Code by posting a position with a job title not specifically listed in the Code.

SUMMARY: Respondent posted and accepted applications in regard to a position identified as "Assistant Supervisor of Transportation." Grievant contends this is improper. Supervisor of Transportation is a position recognized and defined in W. Va. Code § 18A-4-8, the specific title Assistant Supervisor of Transportation is not listed therein. Eleven individuals, including Grievant made application for the position of Assistant Supervisor of Transportation. Grievant was not the successful applicant. Grievant contends the position was contrived and the Respondent invented the position with orchestrated qualifications to favor a specific applicant.

County School Boards have the authority to made decisions affecting promotions and the filling of service personnel positions. In exercising its substantial discretion in matters relating to school personnel, Respondent must be reasonable, execute duties in the best interests of the schools, and in a manner which is not arbitrary or capricious. Grievant failed to establish by a preponderance of the evidence that Respondent violated any section of the W. Va. Code or acted in an arbitrary or capricious manner. Accordingly, this Grievance is Denied.

KEYWORDS: SELECTION; QUALIFICATIONS; COMPETENCY TESTING; DISCRIMINATION; FAVORITISM

CASE STYLE: FUCCY v. HANCOCK COUNTY BOARD OF EDUCATION AND DAVID LOWTHER, INTERVENOR

DOCKET NO. 2008-0264-HANED (1/14/2009)

PRIMARY ISSUES: Whether Grievant should have been selected over Intervenor for the position at issue and whether she should have been allowed to take the custodian competency test.

SUMMARY: Intervenor was selected over Grievant for the position of Food Truck Driver/Custodian. Grievant, a substitute bus operator, argued that she should have been given the opportunity to take the custodian competency test in order to qualify for the position. However, pursuant to applicable statutes, the board of education is obliged to offer a vacant position to qualified applicants who already hold the classification title in question, and competency testing is not required, unless no qualified applicants apply. Intervenor held the applicable class titles, having taken the custodian test when this position had been posted in 2005.

Grievant also contended that Respondent engaged in discrimination and favoritism by allowing Intervenor and others to substitute in the position at issue, alleging they were allowed an opportunity to take the custodian competency test that others were not given. These allegations were simply untrue, in that Intervenor and the other substitutes had qualified as custodians by virtue of taking the competency test when they applied for this position in 2005. Grievant had not applied at that time, so she was not qualified as a custodian when it was posted in 2007. No discrimination or favoritism was proven. Grievance DENIED.

KEYWORDS: SUBSTITUTE; ROTATION LIST; RESIGNATION; SENIORITY

CASE STYLE: YEAGER v. KANAWHA COUNTY BOARD OF EDUCATION

DOCKET NO. 07-20-149 (1/20/2009)

PRIMARY ISSUES: Whether the substitute placed in the assignment at issue had resigned his employment? Whether Grievant should have been placed in the assignment because of his seniority?

SUMMARY: Grievant is employed by Respondent as a substitute Electrician. A regular employee of Respondent had to take some time off work, and a substitute was needed to fill his position. This employee did not request a leave of absence. Respondent filled the position from the substitute Electrician rotation list, which consisted of two people, including Grievant. Grievant was not next in line on the substitute Electrician rotation list, and was not placed in this position. Grievant argued the employee who was placed in this assignment had resigned his employment with Respondent, but he did not demonstrate that this was true. Grievant also argued he should have been placed in this long-term assignment because of his seniority. Grievant is mistaken. Unless the regular employee requests a leave of absence, all absences are filled from the substitute rotation list, and Grievant was not next in line on the substitute rotation list. Grievance DENIED.

TOPICAL INDEX

STATE EMPLOYEES

KEYWORDS: CLASSIFICATION; REALLOCATION; BEST FIT

CASE STYLE: FIELDS v. Department of Health and Human Resources/Mildred Mitchell-Bateman Hospital AND Division of Personnel

DOCKET NO. 2008-1444-DHHR (1/29/2009)

PRIMARY ISSUES: Whether the Grievant was properly classified as a Nutritionist 2 where she works in a state facility, provides dietetic recommendations and supervises several nutrition related personnel?

SUMMARY: Grievant's position is classified in the Nutritionist 2 classification. She asserts that her position is not properly classified and that the Nutrition Director classification is the appropriate classification. Respondents assert that the Nutritionist 2 classification is the "best fit" for the Grievant's position, and the Nutrition Director classification is meant for only those positions that involve "directing nutrition services in a regional public health nutrition program offering a variety of services."

The Grievant's position involves work in a state facility providing dietetic recommendations and hospital administration/supervision. When compared to the Nutrition Director classification, the Nutritionist 2 classification is the "best fit." This grievance is DENIED.

KEYWORDS: COMMUTING POLICY; RELIEF

CASE STYLE: WHITE, ET AL. v. DIVISION OF NATURAL RESOURCES

DOCKET NO. 07-DNR-396 (1/16/2009)

PRIMARY ISSUES: Whether the relief requested, that Respondent be ordered to adopt a commuting policy, was available through the grievance procedure?

SUMMARY: Grievants are Conservation Officers. All Conservation Officers employed by the Division of Natural Resources are required to establish a residence in their county of assignment. Based upon a rumor that DNR was going to adopt a "commuting policy," a few Officers either moved outside their assigned county, or never moved to their newly assigned county. A commuting policy was never adopted, but these Officers who established residences outside their assigned counties because of the rumor, were given permission to continue to reside outside their counties, so long as they continued in their present assignments. Grievants seek as relief that the undersigned require Respondent to adopt a commuting policy. The undersigned has no authority to grant the relief requested. Grievance DENIED.

KEYWORDS: DEFAULT; LEVEL ONE HEARING; DECISION; APPEAL PARAGRAPH; REASONS; SUBSTANTIAL COMPLIANCE

CASE STYLE: MAYHEW v. HAMPSHIRE COUNTY HEALTH DEPARTMENT

DOCKET NO. 2009-0222-HAMCHDEF (1/12/2009)

PRIMARY ISSUES: Whether the level one hearing was held within the statutory time period, and whether a default occurred because the level one decision did not contain an appeal paragraph or the reasons for the decision?

SUMMARY: Grievant argued a default occurred when the level one hearing was not scheduled within ten days of the date the grievance was filed, and when the decision failed to state the reasons for the decision, and failed to include an appeal paragraph. The statutory provisions applicable to this grievance require that a level one conference be held within ten days of the date the grievance was filed. Respondent has fifteen days from the date the grievance is filed, however, to hold a hearing. The level one hearing was held within fifteen working days of the date the grievance was filed.

The decision issued was lacking a clear statement of the reasons the grievance was denied, and it did not contain an appeal paragraph. These procedural deficiencies do not provide grounds for a claim of default under the circumstances presented here. Default claim DENIED.

KEYWORDS: DISABILITY; ACCOMMODATION; DISCRIMINATION

CASE STYLE: CROWL v. JEFFERSON COUNTY HEALTH DEPARTMENT

DOCKET NO. 2008-1574-JEFCH (1/27/2009)

PRIMARY ISSUES: Whether a particular disability accommodation is discriminatory under the grievance statute.

SUMMARY: Grievant asserts a claim of discrimination by her employer when she was moved from office space that she was allowed to use under a former administrator. Grievant argues that her medical condition requires that she be moved back into her former office in order to make reasonable accommodations for her. Respondent counters that the decision to move Grievant to the reception area of the office was in the best interest of the department by utilizing staff more effectively and saving the department money in expenses. While it is undisputed that Grievant suffers from certain medical conditions, which may or may not be recognized as disabilities, numerous changes were made at the work place by the Respondent to meet Grievant's request for reasonable accommodations. Grievant's claim with regard to discrimination in the assignment of her working space is without merit. This grievance is denied.

KEYWORDS: DISCIPLINE, SUSPENSION, MITIGATION, HORSEPLAY

CASE STYLE: SNEDEGAR v. DIVISION OF CORRECTIONS/ANTHONY CORRECTIONAL CENTER

DOCKET NO. 2008-1889-MAPS (1/15/2009)

PRIMARY ISSUES: Whether the suspension of a Correctional Officer 3, for 24 hours, was appropriate after he throw a cup and hit a co-worker in the face with it?

SUMMARY: Grievant discovered a co-worker that he believed was sleeping on the job. Grievant attempted to throw a small amount of water on the co-worker to wake him up. The cup slipped from Grievant's hand and hit the co-worker in the face near his eye. Respondent suspended Grievant for twenty-four work hours without pay, contending he is a supervisor and it was inappropriate for him to participate in this kind of conduct. Grievant alleges that the incident was an accident and the penalty was too harsh. Respondent demonstrated that the conduct violated their policy and that the length of the suspension was not so disproportionate to the suspension that mitigation is appropriate. Respondent followed proper procedure in implementation of the suspension and it was based upon credible evidence. The grievance is DENIED.

KEYWORDS: DISCRIMINATION, COUNSELING, VERBAL WARNING, WRITTEN WARNING, REMOVAL, EMPLOYEE FILE, MITIGATION, PUNISHMENT, NOTICE, HORSEPLAY, PATIENT ABUSE, POLICY MEMORANDUM 2104

CASE STYLE: LAYNE v. DEPARTMENT OF HEALTH AND HUMAN RESOURCES/MILDRED MITCHELL-BATEMAN HOSPITAL

DOCKET NO. 2009-0172-DHHR (1/8/2009)

PRIMARY ISSUES: Whether a suspension of ten days was excessive where Grievant "puffed" talcum powder on a patient with a mental disability and had notice that horseplay with patients was inappropriate?

SUMMARY: Grievant was suspended for ten days after an inappropriate horseplay incident involving a patient with a mental disability. She alleges that the incident was not serious and the suspension was excessive. Grievant and a patient "puffed" talcum powder on each other. The patient threw water on the Grievant. Grievant believes the suspension to be retaliatory.

Respondent argues that the horseplay incident was serious because the patient had a respiratory medical condition that could have been exacerbated by the powder. Further, Respondent maintains that Grievant's conduct sets a poor example for other patients and constitutes "physical abuse" of a patient.

Respondent has established by a preponderance of the evidence that an inappropriate horseplay incident occurred. In its suspension letter, the Respondent improperly cited and considered past disciplinary actions that should have been removed from the Grievant's file; nevertheless, mitigation is not appropriate.

This grievance is GRANTED, in-part, and DENIED, in-part.

KEYWORDS: DISCRIMINATION, DISMISSAL, MITIGATION, DISPROPORTIONATE PENALTY, ABUSE OF DISCRETION

CASE STYLE: FARR v. REGIONAL JAIL AND CORRECTIONAL FACILITY AUTHORITY/SOUTHERN REGIONAL JAIL

DOCKET NO. 2009-0532-MAPS (1/2/2009)

PRIMARY ISSUES: Whether The dismissal of a Correctional Officer should be mitigated because there was a past practice of only giving employees a two day suspension for the same offence and there were significant mitigating factors that led to his failure to follow the policy for release of inmates?

SUMMARY: Grievant does not deny that he mistakenly released a prisoner from the Jail who was not properly authorized to be released. Grievant argues that the penalty of dismissal is disproportionate to his offence and that the punishment should be mitigated. Respondent argues that the unauthorized release of a prisoner is serious and unforgivable mistake and the dismissal of grievant is justified. Grievant had a good work record up to the time the bad release occurred. Due to staffing decisions at the jail, he was placed in a very difficult situation for which he was not well prepared and other employees who made similar mistakes received significantly less severe punishment. Given the totality of the circumstances, the punishment of dismissal was disproportionate to the offence and the grievance is GRANTED.

KEYWORDS: DISMISSAL; DISCRIMINATION; CLEARLY EXCESSIVE; GROSS MISCONDUCT; MEDICATION ERRORS; MISSING MEDICATION; MEDICATION ADMINISTRATION RECORD

CASE STYLE: COX v. DIVISION OF VETERAN'S AFFAIRS

DOCKET NO. 2009-0387-CONS (1/30/2009)

PRIMARY ISSUES: Whether Respondent proved the charges against Grievant? Whether the punishment was clearly excessive or discriminatory?

SUMMARY: Grievant, an LPN, was dismissed from her employment at the Veterans Nursing Facility in Clarksburg, for gross misconduct. On August 15, 2008, Grievant did not initial the Medication Administration Record ("MAR") in 35 places as she dispensed the 7:30, 8:00 and 9:00 a.m. medications to residents of the Facility. This was discovered by Facility personnel when the MAR was reviewed sometime shortly after 10:45 a.m. Grievant was aware she was required to initial the MAR as medication was dispensed. Grievant believed her failure to initial the MAR should have been excused because she was so busy, the RN on duty would not help her, and she had 24 hours to make sure she had initialed every space on the MAR. She also asserted that other nurses had not initialed the MAR in a timely fashion. Grievant presented no evidence that she was so busy in the early morning of August 15, 2008, that she could not have completed her duties as required and properly documented whether the residents of this Facility had taken their prescribed medications. In addition, on July 21, 2008, a narcotic, being administered for pain, was missing from a resident's medications. Grievant gave the resident three pills, but initialed on the MAR that she had given the resident four pills, and did not report the missing pill, because she did not want to get a co-worker in trouble. Grievant did not demonstrate the discipline imposed was clearly excessive or discriminatory. Grievance DENIED.

KEYWORDS: EVALUATION; COUNSELING; COACHING; DISCIPLINARY; BURDEN OF PROOF; ABUSE OF DISCRETION

CASE STYLE: SPENCE v. DIVISION OF NATURAL RESOURCES

DOCKET NO. 2008-1112-DOC (1/30/2009)

PRIMARY ISSUES: Whether the matter was disciplinary, and whether it was an abuse of discretion for Grievant to be counseled regarding the proper procedure for requesting leave?

SUMMARY: Grievant received a counseling document which informed him that he was not following proper procedure regarding submission of leave requests. Although there had been emails and meetings where the issue of leave was discussed, Grievant did not understand that leave was to be requested in advance. Even after being required by his supervisor to complete a leave form in a parking lot, because he had not submitted the required form with the proposed schedule for the upcoming week in which he intended to use the leave, Grievant continued to request leave without submitting the form in advance. Therefore, an evaluation form was completed by Grievant's supervisor, explaining the proper procedure, so that Grievant would understand how to comport with his employer's policy. Grievant failed to establish any abuse of discretion in this matter. Grievance DENIED

KEYWORDS: FUNCTIONAL DEMOTION; TIMELINESS AT LEVEL ONE

CASE STYLE: DICKEY, ET AL. v. DIVISION OF LABOR

DOCKET NO. 2008-1820-CONS (1/21/2009)

PRIMARY ISSUES: Whether Grievants have been subjected to a functional demotion with regard to their duties.

SUMMARY: Grievants are employed as Labor Inspectors 2 in the Respondent's Wage and Hour Section. In April 2007, Commissioner David W. Mullins proposed a restructuring plan that reduced the assigned areas of responsibilities for all Labor Inspectors. The reason for the change in assigned responsibilities was the Respondent's need to better manage staff resources to fully implement the undocumented worker program, to conduct more contractor licensing investigations, and to reduce the amount of time it took to respond to and investigate requests for assistance. Grievants assert this reduction of duties and responsibility without a salary reduction, which may impact their ability to obtain future job advancement, amounts to a functional demotion. Respondent provided rational, job related reasons for all the changes that occurred. This grievance is denied.

KEYWORDS: NON-SELECTION, SELECTION, DISCRIMINATION, QUALIFICATION, ARBITRARY AND CAPRICIOUS, INTERVIEW, SENIORITY

CASE STYLE: WOOLRIDGE v. DIVISION OF HIGHWAYS

DOCKET NO. 2008-0416-DOT (1/23/2009)

PRIMARY ISSUES: Whether Respondent's selection for a TCCMAIN position was arbitrary and capricious where Grievant was chronologically older than, and had slightly more seniority than, the successful applicant?

SUMMARY: Grievant is employed as a Highway Equipment Operator 3 with the Department of Transportation/Division of Highways. He applied for a TCCMAIN position and was not the successful applicant. He alleges that he should have been selected for the position because he has more seniority than the successful applicant. Further, Grievant alleges he was not selected because of his age.

Grievant has not established by a preponderance of the evidence that the Respondent's selection of another applicant was arbitrary and capricious. Moreover, the Grievant has presented no evidence concerning his discrimination claim. This grievance is DENIED.

KEYWORDS: PROBATIONARY EMPLOYEE, SATISFACTORY PERFORMANCE, UNSATISFACTORY PERFORMANCE

CASE STYLE: WILLIAMS v. DIVISION OF JUVENILE SERVICES/JAMES H. "TIGER" MORTON JUVENILE CENTER

DOCKET NO. 2009-0184-MAPS (1/16/2009)

PRIMARY ISSUES: Whether the Respondent improperly dismissed a probationary correctional officer for unsatisfactory performance where the employee's performance was inconsistent?

SUMMARY: Grievant was employed as a probationary Correctional Officer 1. Respondent Department of Juvenile Services ("DJS") dismissed Grievant during his initial one year probationary period of employment. DJS counseled the Grievant numerous times about his work performance. Grievant admits that several counseling sessions and one verbal warning occurred. Further, he admits he violated DJS policy and procedure. However, Grievant maintains his performance was satisfactory.

Probationary employees may be dismissed at any time for unsatisfactory job performance. The Grievant has failed to meet his burden of proving that his performance was satisfactory. This grievance is denied.

KEYWORDS: PROBATIONARY EMPLOYEE; DISMISSAL; UNSATISFACTORY PERFORMANCE; WITNESS LIST

CASE STYLE: HAMMOND v. DIVISION OF VETERAN'S AFFAIRS

DOCKET NO. 2009-0161-MAPS (1/7/2009)

PRIMARY ISSUES: Whether Grievant proved his performance was satisfactory.

SUMMARY: Grievant was dismissed from his probationary employment as a Veterans Service Officer I, in the Elkins Field Office, for unsatisfactory performance. Grievant's primary job responsibility was to interview veterans and help them obtain benefits. Respondent received complaints from veterans about Grievant, and veterans began traveling from Elkins to Clarksburg to obtain services in order to avoid Grievant. Grievant's co-workers personally observed Grievant's interactions with veterans, and stated that he failed to listen to veterans, would interrupt them before they finished, and was accordingly, too quick to decide what action could be taken on behalf of the veteran, and that he did not conduct himself in a professional manner, using slang terminology. When Grievant's co-workers attempted to explain to him how his actions were inappropriate, Grievant would argue with them, and tell them why his approach was correct. Grievant's co-workers found Grievant to be disrespectful and argumentative, and to lack good communication and people skills. Respondent determined that Grievant was not a good fit for the agency. Grievant produced no evidence that his performance was satisfactory, other than his own opinion that he was never rude, and provided information to clients in a professional manner. Grievant did not demonstrate his performance was satisfactory. Grievant's post-hearing request that the testimony of Respondent's witnesses be stricken because Respondent did not file a witness list was denied. Grievance DENIED.

KEYWORDS: SELECTION, ARBITRARY AND CAPRICIOUS, HARMLESS ERROR, EVALUATIONS

CASE STYLE: DELAUDER v. DEPARTMENT OF HEALTH AND HUMAN RESOURCES/BUREAU FOR CHILD SUPPORT ENFORCEMENT

DOCKET NO. 07-HHR-326 (1/28/2009)

PRIMARY ISSUES: Whether Respondent's selection process for a supervisor position was arbitrary and capricious?

SUMMARY: Grievant applied for a posted supervisory position and was not the successful applicant. She alleges that Respondent violated its own policy that controls the selection of applicants and that the process utilized to fill this position was arbitrary and capricious. Respondent was able to demonstrate that the selection process was fair and unbiased. The selection was based upon appropriate criteria which were applied consistently to all applicants. The grievance is denied.

KEYWORDS: SUSPENSION, DISCRIMINATION, ARBITRARY AND CAPRICIOUS, DRUG AND ALCOHOL TESTING

CASE STYLE: THOMAS v. PARKWAYS, ECONOMIC DEVELOPMENT AND TOURISM AUTHORITY

DOCKET NO. 2008-1869-DOT (1/8/2009)

PRIMARY ISSUES: Whether it was discrimination to give an employee a suspension that cost him fifty hours of pay for the same offense that similarly-situated employees received a suspension that cost them forty hours of pay.

SUMMARY: Respondent's policy sets the minimum penalty for an employee failing a drug and alcohol test as a suspension of five working days without pay. Respondent avers that Grievant was given this minimum penalty and it should be upheld. Grievant counters that his work week is made up of four days that are ten hours long, while similarly classified employees, at other work stations, work five-day work weeks with eight hour days. Grievant claims that this difference in work schedules resulted in the minimum suspension costing him ten more hours of pay than a similarly situated employee would receive for the same offense, constituting prohibited discrimination. There is no duty-related reason for penalizing Grievant more severely than others in his classification for the same offense. For reasons more fully set out in the decision the grievance is Granted in part and Denied in part..

KEYWORDS: SUSPENSION; DISCRIMINATION; OVERTIME; INSUBORDINATION; DIABETIC; ULTRA VIRES

CASE STYLE: ARBOGAST v. DIVISION OF CORRECTIONS/HUTTONSVILLE CORRECTIONAL CENTER

DOCKET NO. 2008-1758-CONS (1/30/2009)

PRIMARY ISSUES: Should Grievant have been suspended for refusing to work mandatory overtime, and did he have a right to work overtime during his suspension period?

SUMMARY: Grievant was suspended for three days without pay for refusing to work a mandatory extra shift. An insulin-dependent diabetic, Grievant refused because he did not have enough insulin to get him through another shift. However, Grievant knew of the procedure requiring mandatory overtime, which he had done on numerous occasions, and he had been instructed to keep a sufficient supply of medication with him at all times. Grievant contended that another officer had been allowed to refuse overtime, due to not having sufficient medication, and was allowed to work the overtime the next day. However, this information came from an unsworn statement, and no details were provided or known by either party, making the document insufficient to support Grievant's claim of discriminatory treatment. Grievant's refusal constituted insubordination, and the three-day suspension comported with DOC policy.

Grievant also contended he should have been allowed to work overtime during the week of his suspension. Despite evidence indicating other shift commanders had allowed suspended employees to work overtime, this would obviously defeat the purpose of a suspension and was unauthorized by HCC officials. Therefore, other supervisors' mistakes did not entitle Grievant to relief. Grievance DENIED.